

The European Court of Human Rights and the Armed Conflict between Russia and Ukraine

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On 26 November 2014, the European Court of Human Rights ('ECtHR' or 'the Court') published a [press release](#) announcing that it has communicated to the government of Russia two inter-state complaints that the Ukraine has brought against it concerning the events that took place in the Crimea and the Eastern regions of Ukraine ('the Donbas') in the spring and summer of 2014. These cases arise from Russia's annexation of the Crimea and military support allegedly provided to separatists in the Donbas. Communication is the first procedural step in the adjudication of these complaints. It does not mean that they are admissible or that a violation of the Convention has been found. Russia is merely requested to comment on a set of questions which may shed light on whether the Russian Federation has jurisdiction over some areas of Ukraine where the alleged violations are said to have taken place and to provide information regarding the substance of the alleged violations.

Ukraine v. Russia (I) concerns alleged violations of the European Convention on Human Rights in connection with the [annexation](#) of the Crimea by Russia. In this application, the Ukrainian government asserts that Russia is responsible for multiple breaches of the Convention, including the right to life and the prohibition of torture. Ukraine also complains that Russia has violated the Convention by supporting military units of separatists that are still fighting in the Donbas.

The Court earlier adopted interim measures under Rule 39 in this case instructing both parties not to put the Convention rights of civilian population at risk. These measures are still in force. I have argued [elsewhere](#) that the Court does not have means to ensure compliance with such interim measures and it puts its reputation at risk by engaging in such 'activist' decision-making.

Ukraine v. Russia (I) is not a territorial dispute; it is a claim of a widespread violation of the Convention. The former disputes are principally dealt with by the International Court of Justice (if it has [jurisdiction](#)). It is beyond the Court's mandate to order the return of the Crimea to Ukraine or to otherwise adjudicate territorial matters. The ECtHR is not the right forum for this sort of dispute and it will only be dealing with possible violations of Convention rights on the territory that is under the '[jurisdiction](#)' of one of the Contracting Parties to the Convention.

The second inter-state application by Ukraine concerns the alleged abduction and removal of three groups of orphan children to Russia. The Court has also issued interim measures in this case, in compliance with which Russia returned the children to Ukraine.

Apart from these inter-state applications, the conflict between Russia and Ukraine has also generated about 160 individual applications concerning events in the Crimea and in the Donbas. The applicants brought their complaints against Ukraine, Russia or both. In relation to these cases, the press release does not indicate whether they have been communicated. It seems that the Court just announces that there is a substantial number of individual complaints originating from the conflict in the Donbas. The Court will probably decide whether to communicate these applications on the case-by-case basis. Having said that, the Court has applied interim measures in 104 of these applications, which would ordinarily mean that these applications will be communicated to the government and they will have a priority over all other applications submitted to the Court. It is worth mentioning that communication is not an automatic or overly formal part of procedure. Not every individual complaint submitted to the Court is communicated to the government of the respondent state. If the Court decides that the application is evidently inadmissible it will reject it right away.

It seems that the ongoing conflict in Ukraine will pose a number of complex normative questions to the Court. One of the most interesting constitutional questions is the question of territorial jurisdiction of the Contracting Parties under Article 1 of the Convention. In other words, which State should be held responsible for the violations of individual rights that have happened on the territory with unclear legal status, namely in the Crimea

or in the Donbas. While Russia has legally acknowledged its control over Crimea by now, this was not the case when the Ukrainian authorities brought the application to the Court. It will have to establish whether Russia is responsible for violations of human rights before the official recognition of the annexation has taken place.

The Donbas is an even more complex situation because Russia has always denied its involvement. Having said that, the Court has had to deal with complex issues of establishment of jurisdiction over a territory beyond geographical borders of the respondent state in the past, for example, in [Transdnistria](#), [Northern Cyprus](#) and even in [Iraq](#). The fact that the Contracting Party denies its involvement into a particular set of events does not mean that the Court will accept this position. The Court has developed an autonomous test, which confirms that a Contracting Party to the Convention would have jurisdiction over the territory if it exercises 'effective control' over this territory. This test is fairly simple – its application to the factual scenarios is much more complex not only in terms of legal interpretation but even more in terms of fact finding and evidence. The Court will have to establish that Russia had effective control over Crimea and Eastern Ukraine and it might be a meticulous task.

An even more important existential question will be what the Court can do in the context of ongoing military conflict. The drafters of the Convention arguably thought that war prevention and halting wide scale violations of human rights would be the most important tasks of the ECtHR. Unfortunately, the Court seems to be ill-equipped to deal with major humanitarian crises in Europe. In the situation of such crises, the voice of the Court is not the most important consideration for the Contracting Parties involved. They act under major political pressure and cost of compliance with interim measures or the judgments of the ECtHR might be prohibitively high. Lack of compliance in this context might undermine the reputation of the ECtHR. It does not mean that the Court should not do anything but it has to act very carefully especially in case of ongoing conflicts as the situations is very sensitive and it is very easy for the Contracting Parties to blame the Court of applying double standards or being biased.

Inter-state cases are always complex and controversial. Their litigation takes years and hopefully the conflict in Ukraine will be well over by the time the Court delivers its judgments in these inter-state cases.

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